

SECTION 8. PROCUREMENT CONTRACTS

This section is intended as general legal guidance as to assist in consideration and deliberations on procurement contracts.

A. ADVERTISED COMPETITIVE BIDDING

The Charter of the City of Fresno ("Charter") in Section 1208 requires competitive bidding on contracts involving the expenditure of more than \$27,000 for "materials, supplies, equipment or for public works construction." The Charter requires that this amount be adjusted annually in response to the national Consumer Price Index ("CPI") The most recent adjustment set the threshold amount at \$31,000.

Under Section 1208, Council "may reject any and all bids presented and may readvertise in its discretion." Section 1208 further requires that when contracts are awarded thereunder, they "shall be let to the lowest responsive and responsible bidder." A "responsive bidder" is one who complies with all the requirements of the specifications. However, a bid which departs from plans and specifications in certain details but proposes a performance substantially conforming to the City's needs may be sufficient if Council determines that such departure constitutes a "minor irregularity." A minor irregularity is one which does not deprive the City of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, is of such a nature that it does not adversely affect competitive bidding by giving a bidder a substantial advantage over other bidders, thereby restricting or stifling competition.⁸³

The interpretation of the term "responsible bidder" is of critical importance in any discussion concerning competitive bids. A line of cases dating back to 1915 has construed this term as precluding a decision-making body from imposing any conditions external to "lowest and responsible."⁸⁴ In *Neal*, the governing board had adopted a resolution directing departments to award all jobs for printing to union offices.

While the term "lowest" is easily understood, a general discussion of the term "responsible" is necessary. The most recent California Supreme case on this subject provides:

It bears emphasis that the word "responsible" in the context of the statute is not necessarily employed in the sense of a bidder who is trustworthy so that a finding of nonresponsibility connotes untrustworthiness. Rather, while that term includes the attribute of trustworthiness, it

⁸³ *McQUILLAN MUN. CORP.* 29.65 (3rd Ed.).

⁸⁴ *Neal Publishing Company v. Rolph*, 169 Cal. 190 (1915).

also has reference to the quality, fitness and capacity of the low bidder to satisfactorily perform the proposed work. Thus, a contract must be awarded to the lowest bidder unless it is found that he is not responsible, i.e., not qualified to do the particular work under consideration. [W]e hold that the contract for a public construction project must be awarded to the lowest monetary bidder . . . unless it is found that the lowest bidder is not responsible, in the sense defined above. There is no basis for the application of a relative superiority concept under that section.⁸⁵

The court in *Inglewood* went on to hold that before a public works contract is awarded to other than the lowest monetary bidder, the public body must notify the lowest bidder of any evidence reflecting upon its responsibility, afford that bidder an opportunity to rebut such adverse evidence, and permit such bidder to present evidence that it is qualified to perform the contract.⁸⁶

Charter Section 1208 allows for an exemption to the requirement of awarding the contract to the lowest responsive and responsible bidder. Council may adopt an ordinance extending local businesses up to a 5% preference. On November 11, 1996, Council adopted such an ordinance which provides that local businesses bidding City contracts under \$50,000 for materials, supplies, and/or equipment will receive a 5% preference whenever the bid amount of the lowest responsive and responsible bidder is less than or equal to \$250,000. Local businesses bidding City contracts for public works construction will receive a 0.5% preference when the amount of the preference does not exceed \$1,000.⁸⁷

There are exceptions to competitive bidding that are handled by Council resolution. Charter Section 1208 permits Council to forego advertising for bids, "if such purchase shall be deemed by a super majority of the Council to be of urgent necessity for the preservation of life, health or property" Also, advertised competitive bidding is not required when the work to be done or the goods to be supplied can only be provided by one source since there is no possibility for real competition.⁸⁸ This is known as the sole source exception.

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⁸⁵ *City of Inglewood-L.A. County Civic Center Auth. v. Superior Court*, 7 Cal. 3d 861, at 867 (1972), (emphasis added).

⁸⁶ The Council has adopted Resolution 2001-52 establishing procedures for appeals and debarment in the competitive bidding process.

⁸⁷ FMC § 3-105(h).

⁸⁸ *Los Angeles Dredging Co. v. City of Long Beach*, 210 Cal. 348 (1930).

B. CONTRACTS NOT REQUIRING ADVERTISED COMPETITIVE BIDDING

Fresno Municipal Code Section 3-109, as amended by Ordinance 2001-6, effective March 15, 2001, authorizes the Purchasing Manager to contract for all public works construction, equipment, materials, or supplies for which an appropriation has been made and competitive bidding is not required by Charter. It is the duty of the Purchasing Agent to use his or her best efforts to secure the lowest price.⁸⁹

The newly amended Section 3-109 also authorizes the City Manager, or his/her designee, to contract for all services required by the City for which an appropriation has been made, including professional services, provided the contract involves an expenditure of City monies of less than or equal to \$50,000.

Requests for Proposals ("RFP") for services are generally utilized by the City but are not mandated by Charter or ordinance. In practice, most contracts for services are let pursuant to an RFP process. Contract awards made pursuant to RFPs are not subject to "lowest responsive and responsible bidder" and usually allow for negotiation of contract terms.

Currently, Section 3-109.1 of the Fresno Municipal Code provides primary preference to local firms and a secondary preference to non-local firms associated with local firms when contracting for consulting and other professional services. Finally, Council adopted an ordinance on November 11, 1996 permitting the purchasing agent to extend a preference to local businesses in the purchase of materials, supplies, equipment and/or public works construction for which advertised bidding is not required, provided the preference is applied in the same manner as that prescribed for advertised competitive bidding.⁹⁰

C. REDEVELOPMENT AGENCY CONTRACTS

Article 43.1 of the Local Agency Public Construction Act⁹¹ sets forth the competitive bidding requirements for contracts awarded by redevelopment agencies. Section 20688.2 provides:

Any work of grading, clearing, demolition, or construction undertaken by the agency shall be done by contract after competitive bids if the cost of such work exceeds the amount specified in Section 37902 of the Government Code, as that section presently exists or may be hereafter amended. With respect to work of grading, clearing, demolition, or construction which is not in excess of such amount, the agency may contract the work without

⁸⁹ FMC § 3-103.

⁹⁰ FMC § 3-101.

⁹¹ Public Contract Code §§ 20688.1 - 20688.4.

competitive bids, and in contracting such work may give priority to the residents of such redevelopment project areas and to persons displaced from such areas as a result of redevelopment activities.

Government Code Section 37902, referenced in the above quotation, was repealed in 1982 and reclassified in Public Contract Code Section 20162. The monetary amount stated in this section is \$5,000. Thus, work of grading, clearing, demolition, or construction undertaken by the Redevelopment Agency of the City of Fresno ("Agency") shall require competitive bidding if the cost of such work exceeds \$5,000.

We recognize that as a charter city, Fresno does not have to comply with state competitive bidding laws on projects that constitutes "municipal affairs." However, the City has elected to establish its own competitive bidding requirements.⁹² The exemption of charter city contracts from state competitive bidding requirements sometimes lead to the misconception that this exemption would also apply to contracts awarded by a redevelopment agency. Currently, there is no body of law to support this conclusion.

The authority to establish a redevelopment agency and the authority for the agency to function as a redevelopment agency is granted by the Community Redevelopment Law of the state of California.⁹³ Redevelopment agencies are, therefore, creations of the state and must abide by State law.

Community redevelopment is of statewide concern and preempted by the State Legislature. Community Redevelopment Law specifically states that:

For these reasons it is declared to be a policy of the state:

. . . (c) That the redevelopment of blighted areas and the provisions for appropriate continuing land use and construction policies in them constitute public uses and purposes for which public money may be advanced or expended and private property acquired, and are governmental functions of state concern in the interest of health, safety, and welfare of the people of the State and of the communities in which the areas exist⁹⁴

Consistent with the state's intention to preempt the field in the area of redevelopment, the \$5,000 limit for redevelopment agency contracts as set forth in Public Contract Code Section 20688.2 is the controlling statutory limit.

⁹² Charter § 1208 and FMC Chapter 3, Article 1.

⁹³ Health and Safety Code §§ 33000 *et seq.*

⁹⁴ Health and Safety Code § 33037; emphasis added.

On March 11, 1997, the Agency adopted new bylaws. The City's purchasing agent is the officer in charge of the Agency's purchasing function, and may contract for all services, work, equipment, materials or supplies the Agency requires. (Redevelopment Agency Bylaws Article II, Section 7.) The Agency is to conduct its business according to rules and regulations applicable to the City's business, unless provided otherwise by statute.

D. PROHIBITION OF PROJECT LABOR AGREEMENTS

Project labor agreements, also known as "prehire agreements," are defined as "collective-bargaining agreements providing for union recognition, compulsory union dues or equivalents, and mandatory use of union hiring halls, prior to the hiring of any employees."⁹⁵

On February 8, 2000, the Council adopted an ordinance prohibiting in any City contract for the construction, maintenance, repair, or improvement of public works, a requirement that a contractor, subcontractor, or material supplier, or carrier engaged in the construction, maintenance, repair, or improvement of public works, execute or otherwise become party to any project labor agreement, collective bargaining agreement, prehire agreement, or other agreement with employees, their representatives, or any labor organization as a condition of bidding, negotiating, being awarded, or performing work on a public works contract. "Public works" is defined in the ordinance to mean a building, road, street, sewer, storm drain, water system, irrigation system, reclamation project, redevelopment project, or other facility owned or to be owned or to be contracted for by the City of Fresno or the Redevelopment Agency of the City of Fresno, that is paid for in whole or in part with tax revenue paid by residences of the City of Fresno; or any other construction or nonconstruction service.⁹⁶

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⁹⁵ *Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 122 L.Ed.2d 565, 578, 113 S.Ct. 1190 (1993) (*Boston Harbor*).

⁹⁶ FMC § 3-109.2.